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IS NIGERIA A SECULAR STATE? LAW, HUMAN RIGHTS AND RELIGION IN CONTEXT

By: Osita Nnamani Ogbu*

I. INTRODUCTION

Nigeria is a multi-ethnic and multi-religious state. The two major religions in the country are Islam and Christianity. Adherents of these two major religions take divergent positions on the question of the secularity of the Nigerian state. While most Christians argue for separation of the Nigerian state from religion, most Muslims¹ advocate the fusion of religion, the state and the law. To many of them, the Sharia ought to govern the totality of the life of a Muslim from cradle to grave. For instance, the Governor of the Central Bank of Nigeria, Alhaji Sanusi Lamido Sanusi, maintained that any call on Muslims to abandon religious law in the name of secularism will fail.² Many Muslims in Nigeria appear to seek to be governed by the Sharia in all their human activities.

The word Sharia has been defined as the complete universal code of conduct drawn by the creator, Allah, through His Messenger, Muhammad, to mankind, detailing the religious, political, economic, social, intellectual and legal systems. It is meant for universal application, covering the entire spectrum of life, prescribing what is lawful (*halal*) and prohibiting what is unlawful (*haram*).³ Sharia is the Islamic law, which is based on the Quran, the *Hadiths*, and the works of scholars in the first two centuries of Islam.⁴

The 1999 Constitution did not expressly proclaim Nigeria to be a secular state. However, it prohibits both states and the Federal Government from adopting any religion as state religion⁵, and guarantees to every person the right to freedom of thought, conscience and religion⁶ as well as the right to freedom from discrimination on grounds, inter alia, of religion.⁷ On the other hand, the Constitution in chapter II under the fundamental objectives and directive principles of state policy, enjoins the state⁸ to provide facilities for, among other things, religious life.⁹ In addition, it makes provision for the establishment of Sharia Courts of Appeal though with jurisdiction restricted to

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¹ The word is also spelt "Moslem". For purposes of consistency, the spelling "Muslim" will be adopted in this work except where the word appears otherwise in a quotation.

² S.L. Sanusi, "Reflections on the Inter-cultural Dialogue about Shari'ah" in P. Ostien, J.M. Nasir, & F. Kogelmann, eds, *Comparative Perspectives on Shari'ah in Nigeria* (Ibadan: Spectrum Books Limited, 2005) 251 at 264

³ A. Mustapha, "Shari'a: A Conceptual Framework" in A.M. Yakubu, et al., eds, *Understanding Shari'a in Nigeria* (Ibadan: Spectrum Books Limited, 2001) at 17.

⁴ N. Morris, *The Atlas of Islam: People, Daily Life and Traditions* (Hauppauge, NY: Barrons, 2003), at 13.

⁵ *Constitution of the Federal Republic of Nigeria 1999 (as amended)* [1999 Constitution], s. 10.

⁶ *Ibid* at s.38(1)

⁷ *Ibid* at s. 42(1).

⁸ The Supreme Court of Nigeria held in *A.G. Ondo State v A.G. Federation & 35 Ors*, [2002] 9 NWLR (Pt. 772) 222, that the word, "state" in the context of the fundamental objectives and directive principles of state policy includes the Federal, State and Local Governments, as the case may be.

⁹ 1999 Constitution, *supra* note 5, s. 17(3).

questions of Islamic personal law. The Constitution also provides for the taking of oath of office by certain public officers.¹⁰ Although the Constitution is silent on the sources of Nigeria law Islamic law has been recognized as one of the sources of Nigerian law.¹¹

These Constitutional provisions have been the subject of tendentious interpretations. While some people contend that the Constitution has provided for the secularity of the Nigerian state, others contend to the contrary. Moreover, there is no agreement as to the meaning of secularism. Even at the government level, there have been conflicting pronouncements by ministers of the federal government on the status of Nigeria in terms of the relationship of Nigerian state to religion. Recently, the Christian Association of Nigeria [CAN] urged President Goodluck Jonathan to sanction the Minister of State for Foreign Affairs, Mohammed Nurudeen, for allegedly saying that "Nigeria is one of the most Christian-populated Islamic nations in the world".¹² The President of CAN, Bishop Oritsejafor, further maintained that section 10 of the Nigerian Constitution affirms the secularity of Nigeria. In further reaction to the alleged pronouncement of the Minister of State for Foreign Affairs, the Minister of Foreign Affairs, Ambassador Olugbenga Ashiru, said that Nigeria remains a secular state despite its membership in the Organization of Islamic Conference [OIC]. According to him, the Constitution is very clear that Nigeria is a secular nation.¹³

This article will examine the concept of secularity of state in historical perspective and will consider the question of whether Nigeria is a secular state having regard to the provisions of the 1999 Constitution of Nigeria (as amended). The debate as to whether Nigeria ought or ought not to be a secular state is outside the scope of this work.

II. THE CONCEPT OF SECULARISM IN HISTORICAL PERSPECTIVES

The word, 'secular', is derived from *saeculum* which in classical Latin meant "an age", "a time", "a generation" or "the people of a given time". It also came to mean a century.¹⁴ The word was used pejoratively in the second, third, and fourth centuries by the church fathers to refer to the world of time - the temporal world - in contradistinction to the eternal kingdom of God.¹⁵ A prominent church father, St. Augustine, conceived of man's nature as twofold: he is both a spirit and a body, and therefore at once a citizen of this world and of the heavenly city. To him, the fundamental fact of human life is the division of human interests accordingly - the worldly interests that centre about the body and the other worldly interests that belong specifically to the soul.¹⁶ He saw both the church and

¹⁰ *Ibid*, ss. 52, 94, 135, 140, 142, 149, 180, 186, 185, 187, 194, and 290. The forms of the oath for the specified offices are contained in the seventh schedule to the 1999 *Constitution* as amended. Applicants for citizenship by registration and naturalization under sections 26 and 27 of the Constitution, respectively, are required to take oath of allegiance as prescribed under the 7th schedule to the 1999 *Constitution*.

¹¹ Under the provisions of ordinary law, Islamic law is one of the sources of Nigerian law. See: O.N. Ogbu, *Modern Nigerian Legal System* (Enugu: CIDJPA Press, 2007) at 91.

¹² N. Bellow, "CAN wants Jonathan to sanction minister over comment on religion", *The Guardian* (August 23, 2012).

¹³ Y. Alli, "OIC: Nigeria remains a secular state, says Minister", *The Nation on Sunday* (August 26, 2012).

¹⁴ H.J. Berman, *Law and Revolution - The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 109.

¹⁵ *Ibid*.

¹⁶ G.H. Sabine & T.L. Thorson, *A History of Political Theory*, 4th ed (New Delhi: Oxford & IBH Publishing Co Pty Ltd, 1973) at 184.

the empire to be living in evil times, the *saeculum*. Thus, to St. Augustine, the true Christian, whether priest or layman, lived in both cities – that is, in both the earthly and the heavenly societies.¹⁷ This negative view of the *saeculum* contributed to a sharp division between the regular clergy and the secular clergy. The former was thought to have lived further away from the *saeculum* and closer to the city of God.

In the late eleventh and early twelfth centuries, the papal party spoke rather of the temporal rule of emperors and kings and of temporal law because of the pejorative connotation of *saeculum*, but this meant the same as secular rule and secular law.¹⁸ In any case, the words temporal and secular were equally derogatory terms for they meant time-bound, and connote the product of the decay and corruption of human existence, especially in the sphere of political rule. The antonym of temporal (or secular) was spiritual. The medieval world was thus characterized by this and other similar forms of dualism.¹⁹

In any case, during that era, the distinction between secular and spiritual affairs never translated to separation of religious and political affairs. For instance, Gregory VII and his supporters never doubted that secular government is subordinate to the church in spiritual matters and indirectly in secular matters, and represented divine authority, for the power of the secular ruler was established by God and law flowed ultimately from reason and conscience and must therefore be obeyed.²⁰ Political authority was justified by rooting it in God's inscrutable will. Accordingly, kings were regarded as the divinely appointed agents of God on earth.²¹ The fact that emperors and kings being laymen were responsible only for temporal affairs placed them in subordination to those who were responsible for spiritual affairs. Thus, there was at that time no theory of the secular state as such.

The modern concept of secularism seeks to separate religion from politics, so that the state's existence is not justified by theology.²² Secularization arose out of the tension between science and religion and the schisms between forms of Christianity. The origin of the modern doctrine of secularism can be traced to the renaissance and the reformation.

A school of thought has, however, traced the origin of the doctrine of separating church and state to Jesus Christ, who, unlike Muhammad, never became a head of state. The doctrine, in this view, goes back to the Biblical imperative: Give unto Caesar what is Caesar's and unto God what is God's.²³

¹⁷ Sabine & Thorson, *A History of Political Theory*, *supra* note 16.

¹⁸ Berman, *Law and Revolution*, *supra* note 14 at 109.

¹⁹ For instance, there was the dualism of clergy and laity; the dualism of the kingdom of God and the kingdoms of this world; and the dualism of the spirit and the flesh. All these are exemplified in the dualism of Pope and Emperor. See B. Russel, *A History of Western Philosophy* (New York: Simon and Schuster, 1945) at 303.

²⁰ Sabine & Thorson, *A History of Political Theory*, *supra* note 16 at 222-26.

²¹ I.E. Aligwekwe, "The Ideology of Democracy and the Party System in Presidential Government" (*Paper presented at the Legislative Workshop for Honourable Members of the Anambra State House of Assembly, Enugu, Anambra State, May 1981*) at 9.

²² I. Mclean, *Oxford Concise Dictionary of Politics* (Oxford: Oxford University Press, 1995) at 426.

²³ A.A. Mazrui, "African Islam and Comprehensive Religion: Between Revivalism and Expansion" in N. Alkali et al., eds, *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books, 1993) at 259. He considers Nigeria a secular state.

A. Secularism and the Origin of the Modern State

The origin of the modern state is traced to the Renaissance²⁴ and Reformation,²⁵ the split between Catholics and Protestants and the 30 years wars of religion in Europe. The two groups engaged in a deadlocked war, leaving many Protestants in Catholic circles and vice versa. The church had to seek protection of the king and the king seized the opportunity to establish royal absolutism. The Reformation, with its call for freedom of religion and conscience, in conjunction with the need to settle the religious conflict of the Thirty Years War, resulted in the emergence of a unitary state which stood above the various religions and which, by excluding the question of religious truth, was able to bring the conflict to an end.²⁶

The hostilities were formally ended by the Treaty of Augsburg, 1555.²⁷ Each prince then became free to decide the religious faith of his domain without outside influence.²⁸ This was symbolized by the doctrine that the religion of the king was to be the religion of the kingdom (*cuius regio eius religio*).²⁹ Subsequently, however, the necessity to assure religious tolerance to co-religionists in other lands was generally accepted. Therefore from 1648 (the Treaty of Westphalia) to 1815 (the Vienna Congress Treaty) a number of treaties concluded between European States accorded religious freedom to minority groups in various states and communities. The Treaty of Westphalia of 1648 finally marked the establishment of independent sovereign nation-states in Europe.³⁰ The philosophy behind the theory of sovereignty of state is to set up the King as the head of the state, the object of loyalty of all men irrespective of religious denominations.³¹ Thus, what gave the idea impetus were the dangers of disunion and instability inherent in

²⁴ The revival of learning in Europe after the dark ages is what is meant by the Renaissance. See Aligwekwe, "The Ideology of Democracy", *supra* note 21 at 9.

²⁵ The reformation was a movement for theological and moral reform in the Western Christian Church during the 16th and 17th centuries. Theologically it was an attempt to recover what was considered to be the teaching of the Bible and early Christianity. The religious changes of the Reformation were accompanied by social and political upheavals which led to a permanent split in Western Christianity. See J.R. Hinnells, *The Penguin Dictionary of Religion*, 2nd ed (London: Penguin Books, 1995) at 413. For a more detailed account of the impact of the renaissance and reformation on liberty, particularly freedom of thought, conscience and religion and freedom of expression see R. Hargreaves, *The First Freedom: A History of Free Speech* (Phoenix Mill: Sutton Publishing Limited, 2002) at 39.

²⁶ G. Gerhad, "The Churches and Human Rights" in A. Genkant, ed, *Human Rights and Development* (Bonn: SEF, 1993) at 151

²⁷ G. Ezejiofor, "The Development of the Concept of Human Rights: Definition and Philosophical Foundations" in A.O. Obilade, ed, *Text for Human Rights Teaching in Schools* (Lagos: Constitutional Rights Project, 1999) at 20.

²⁸ *Ibid.*

²⁹ A.J.F. Ajayi, "The National Question in Historical Perspective", *Fifth Guardian Newspapers Annual Lecture*, delivered at the NIIA, November 5, 1992 at 14.

³⁰ S.W. Jackson, "The Rule of Law Among Nations" in A.L. Harding, ed, *The Rule of Law* (Dallas: Southern Methodist University Press, 1961) at 72.

³¹ Sabine, *A History of Political Theory*, *supra* note 16 at 365. The Jama'atu Nasril Islam [JNI] observed that the historical experience of western countries as evidenced by the violent conflicts that raged between church and state some centuries ago has led them to opt for secularity so as to curb the wings of the Church. See: "Text of a Press Conference by the Jama'atu Nasril Islam (JNI) on the Nigerian Constitution and the Nigerian Muslim Ummah, February 13, 1999" *The Guardian* (March 15, 1999) at 16.

sectarian partisanship. The sovereign state emerged to vindicate the supremacy of the secular order against religious claims. It forced the clerisy into a position of subordinate authority. In other words, the territorial and omnipotent state is the offspring of the religious struggles of the sixteenth century.

It is the same philosophy that influenced the adoption of secularism by some modern nations. Explaining the rationale for the First Amendment to the American Constitution, Justice Joseph Story in his *Commentaries on the American Constitution* wrote:

*It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject.*³²

B. Contemporary Meaning of Secularism

The contemporary meaning of secularism has evoked divergent and emotive responses and is a matter of intense intellectual dispute. Some Islamic scholars try to equate secularism with godlessness. One proponent of this view is Dr. Lateef Adegbite, former Secretary-General of the *Jama'atu Nasril Islam*. He said:

*No Moslem will support a secular state. I want to say it with all the emphasis at my command because as far as we are concerned, secularity means "godlessness", and Moslems will never support that.*³³

This conception of secularism tries to equate secularism with atheism, which in the broad sense, means the rejection of belief in the existence of deities or God. Some atheists have criticized religion, citing harmful aspects of religious practices and doctrines. On the other hand, secularism does not mean godlessness nor is it antagonistic to religion. A godless state may indeed prohibit religious activities. In agreement with this view, O.E. Nwebo said:

*The concept of secularism is apt to give the impression that Nigeria, for instance, is anti-religion. Far be it from the true meaning. The correct meaning is that the state should not actively support or propagate any particular religion in preference to others, particularly in a multi-religious society like Nigeria.*³⁴

However, the assertion that the concept of secularism gives the impression of godlessness is open to objection. If the concept is misconceived by some people as implying godlessness, that ought not to lead to a general proposition that the concept gives the impression of godlessness. A secular state is not opposed to religion but tries to keep religion outside the public realm.

Another scholar, Abdulrasheed A. Muhammad, while not equating secularism with godlessness, considers a secular state as one which is not concerned with religious affairs. He said:

³² J. Story, "Commentaries on the Constitution of the United States" in E. Witt, *The Supreme Court and Individual Rights*, 2nd ed (Washington DC: Congressional Quarterly Inc., 1988) at 81.

³³ Commentary at a seminar held at the Nigerian Institute of Advanced Legal Studies, Lagos in 2000.

³⁴ O.E. Nwebo, "The Legal Implication of the Declaration of Sharia as a State Religion in Nigeria" (2003) 1 JCLD, ABSU Law Center 51 at 53.

*Secular means not to be concerned with spiritual or religious affairs. A secular state therefore is one which is established on the assumption that political authority is completely independent of religion or supernaturalism and therefore not concerned with the spiritual life of its citizens. The emphasis here is that religion is confined to private practice and individual preference. The state will not adopt any religion as official, neither will it give overt or covert recognition and assistance to any group.*³⁵

It is wrong to say that a secular state will not be concerned with spiritual or religious affairs. Secularism is actually an attempt on the part of the state to create an enabling environment for freedom of religion. To that extent, a secular state is concerned with religious affairs. It is preferable to say that a secular state is not involved in religious affairs rather than saying that it is not concerned with religious affairs. Moreover, it is not an invariable attribute of secularism that the state should offer no assistance to religion. Muhammad only got it right when he said that the emphasis is that religion is confined to private practice and individual preference and that the state is independent of religion.³⁶ Secularism refers to the separation of religious practices from public life.³⁷

To Danny McCain, secularism is usually promulgated for one of at least two reasons. First, whether one believes in God or not is irrelevant to society. Second, secularism in the modern sense arose out of the desire to protect religion, particularly the religions of the minority.³⁸ Secularism is therefore not opposed to religion. It shows tolerance towards all religions and allows full freedom of worship, prayers and all other religious observances, excepting those practices which conflict with the laws of the state.³⁹

Deviating from the trend of equating secularism with godlessness, Bilkisu Yusuf, a Muslim, conceives secularism in somewhat similar terms as most Christians or secularists. According to her, defined simply, secularism entails separation of religion from the affairs of state. She went on to say that it is founded on the view that morality and education should not be based on religion. Yusuf enumerated what she considers to be the essential features of a secular state as follows. In such a state, the government does not have a state religion because there is separation of the affairs of the state and that of religious bodies. Secondly, state support for religion – and in particular, funding religious activities or religious education – is prohibited. Thirdly, the secular state does not regulate the form and growth of various religions, nor does it interfere in their other activities.⁴⁰ In any case, there are some objections to this conception of secularism. It is not an attribute of secularism that education or morality should not be based on religion. Secularism allows religion or morality-based education as a matter of private choice provided that on the whole, education and religion are independent of religion in the state. Furthermore,

³⁵ A.A. Muhammad, "The State and Religious Balancing in Nigeria", *Nigerian Forum: A Journal of Opinion on World Affairs*, Vol. 27, Nos 9-10 (2006) at 294.

³⁶ *Ibid.*

³⁷ D. McCain, "Which Road Leads Beyond the Shari'ah Controversy? A Christian Perspective on Shari'ah in Nigeria" in P. Ostien et al., eds, *Comparative Perspectives on Shari'ah in Nigeria* (Ibadan: Spectrum Books Limited, 2005) at 13.

³⁸ *Ibid.*

³⁹ However, such laws must be reasonably justifiable in a democratic society.

⁴⁰ B. Yusuf, "Da'wa and Contemporary Challenges Facing Muslim Women in Secular States – A Nigerian Case Study" in N. Alkali et al., eds, *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books, 1993) at 279.

state support for religion is not inconsistent with secularism, provided the support applies to all religions without discrimination, and that it does not amount to the state getting involved in running religious affairs.

There is a Marxist dimension to the controversy over the meaning of secularism. Proceeding from an assumption that religion is part of the instrument of exploitation, Dr. Bala Usman opined that a secular state is required to redress the imbalance caused by religious manipulation. He believes that there is systematic manipulation of religious sentiments for the sinister and reactionary purpose of confusing the people and diverting their attention from the harsh conditions of existence.⁴¹ Consequently he canvassed for secularism under which Nigeria will have nothing to do with religion. While this position appears similar to the conception of secularism by some Nigerian Muslims to mean godlessness, which in my view is a misconception of secularism, his subsequent pronouncement bears him out that he did not equate secularism with godlessness. He categorically and forthrightly stated:

*If there is one thing which is so openly essential for ensuring the forging of national cohesion, it is separating the Nigerian State clearly and unambiguously from religion and ensuring that its function is to protect the right of citizens to practice the religious belief of their choice.*⁴²

Adrien Katherine Wing and Ozan O. Varol⁴³ outlined the attributes of secularism as follows. In the first place, sovereignty belongs to the nation and not to a divine body in a secular state. Where sovereignty belongs to a divine power, like in a theocratic regime, offending the government is tantamount to offending God and vice versa. In the second place, religion is separate from state in a secular government. In other words, laws are not based on religion. In the third place, a secular government is neutral towards all religions.⁴⁴ The government cannot, therefore, have an official religion and does not protect one religion over another. Law applies equally to all individuals irrespective of their religious affiliations. Fourthly, a secular regime requires its education and the legal systems to be secular. In other words, the legal system does not contain laws based on religion, and the education system is based on logic and science and not on religious dogma. The fifth attribute of secularism, according to them, is that secularity calls for freedom of religion and conscience. Finally, a secular regime is based on pluralism, which requires the government to respect all religions and religious beliefs. Some of the above attributes of secularism are open to criticism. In the first place, it is objectionable to say that in a secular state, law and education are not based on religion. Law may be based on, or derived from, religion in a secular state provided that religion is not the source of validity of the legal system. Secondly, education in a secular state may be based on

⁴¹ Statement signed by Y.B. Usman et al., "New Nigerian" (February 3, 1986), cited in M.H. Kukah, *Religion Politics and Power in Northern Nigeria* (Ibadan: Spectrum Books Ltd, 1993) at 229.

⁴² Y.B. Usman, *The Manipulation of Religion in Nigeria: 1977-1987* (Kaduna: Vanguard Publishers Ltd, 1987) at 31.

⁴³ See: A.K. Wing & O.O. Varol, "Is Secularism Possible in a Majority-Muslim State? The Turkish Example" (2006) 42 Texas International Law Journal 6. See also: E.A.A. Adegbola, "Equal Deal for All Religious Groups" *Daily Times* (April 16, 1977), quoted in W.I. Ofonagoro & A. Ojo, eds, *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/1977* (Lagos: Daily Times, 1977) at 376.

⁴⁴ Wing & Varol, "Is Secularism Possible in a Majority-Muslim State?", *ibid* at 6.

religion, provided that it is not officially *required* to be so. Secularism only requires that education provided at the public cost should be secular.⁴⁵ The UN Human Rights Committee, in its General Comment No. 22⁴⁶ on the right to freedom of thought, conscience and religion⁴⁷, recognized the liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions.

Furthermore, these six attributes of secularism could be coalesced into fewer categories. The first two attributes can be subsumed under the principle of sovereignty of the state. The third attribute which is the principle of neutrality of state in religious affairs can absorb the sixth. The fourth attribute is really an elaboration of the principles of sovereignty of state and neutrality of state in religious affairs.

To Richard Akinjide, a secular state is a state which does not have or is not predisposed to one religion.⁴⁸ This definition of secularism is also open to criticism. By this definition, a state which has or is predisposed to two or more religions will qualify as a secular state. Secondly, the definition did not capture some other essential elements of secularism. Rev. Fr. Benedict Ohabughiro Okike maintained that secularism means that the supreme civil power and government is determined by the temporal order and not by any religious order.⁴⁹ This is actually the core of secularism but some other elements of the concept need to be captured. From a synthesis of the foregoing definitions of secularism one can say that a secular state is one where: the supreme civil power and government is determined by the temporal as opposed to religious order, implying that sovereignty should belong to the state and not to a religious order; the state does not have any religion as state religion and is neutral or impartial to all religions; the state guarantees freedom of religion. Outside the above basic elements, secular states are not cast in the same mould as there are spectrums of secularism.

C. Spectrums of Secularism

In the United States of America, the establishment of religion clause of the First Amendment which entrenched the secularity of the American state has been interpreted to mean that:

Neither a state nor the Federal Government can set up a church. Neither can they either force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government

⁴⁵ See B.O. Okike, *The Practice of Sharia in Nigeria: A Democratic Secular State* (Owerri: Amamihe Publications, 2000) at 26.

⁴⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4.

⁴⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, UN Doc A/6316, entered into force March 23, 1976.

⁴⁸ R. Akinjide, "Sharia: The Dangers Ahead" *The Guardian* (February 26, 2000), cited in E.E.O. Alemika, "Legal Pluralism and Sharia Penal Code" in E.E.O. Alemika et al., eds, *Human Rights and Sharia Penal Code in Northern Nigeria* (Kaduna: Human Rights Monitor, 2005) at 23.

⁴⁹ See Okike, *The Practice of Sharia in Nigeria*, *supra* note 45 at 26.

can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."⁵⁰

However, this opinion does not pass for a definition of secularism because there are degrees of secularism. It only represents the American brand of secularism which may be stricter than what we have in some other societies.⁵¹

Adrien Katherine Wing and Ozan Varol, after outlining what they consider to be attributes of secularism, were quick to observe that these characteristics describe a theoretically perfect secular government, which, to their knowledge, does not exist.⁵² They therefore concede that there are different degrees and variants of secularism. It has thus been rightly observed that it is possible to draw a wide scale of separation and find different European (secular) countries at varying positions on that scale.⁵³

Proceeding on similar assumption that secularism admits of degrees, R.P. Dhokalia categorized the relationship of a state to religion as follows: formal and functional theocracy; formally theocratic but functionally secular; formally secular but functionally theocratic; formally as well as functionally secular; and egalitarian and protective secular states.⁵⁴ He adumbrated his paradigm as follows. In a formal and functional theocratic state, there is not only an official religion but also no dividing line between secular and religious matters. In formally theocratic but functionally secular state, a state religion is formally recognized but in practice, freedom of religion is guaranteed to adherents of other religions and there is no discrimination on the ground of religion.⁵⁵ In a formally secular but functionally theocratic state, there is no official religion and no handicap on the basis of religion but owing to historical and sociological reasons, religious organizations play strong roles in public affairs to assert traditional personal laws based on religious doctrines. In a formally as well as functionally secular state, there is a wall of separation between state and religion. In egalitarian and protective state, there is no official religion or church and the state is not hostile to religion. However,

⁵⁰ *Everson v. Board of Education of the Township of Ewing* (No. 52), 133 NJL 350 at p. 15-16.

⁵¹ It has been asserted that Turkey and France apply a version of secularism that is stricter than the version that most Western nations, including the United States, have implemented. See Wing & Varol, "Is Secularism Possible in a Majority-Muslim State?", *supra* note 43 at 6. It has been rightly observed that it is possible to draw a wide scale of separation and find different European (secular) countries at varying positions on that scale. See Adegbola, *supra* note 43 at 376.

⁵² Wing & Varol, "Is Secularism Possible in a Majority-Muslim State?" *supra*, note 43 at 6.

⁵³ See Adegbola, "Equal Deal for All Religious Groups", *supra* note 43 at 376.

⁵⁴ R.P. Dhokalia, "The Human Right to Religious Freedom: Problems of Definition and Effective Enjoyment", *Calabar Law Journal*, Vol. 3 (1990) at 96.

⁵⁵ England is given as an example of such a state. Under the provisions of the Act of Settlement the sovereign must join in communion with the Church of England; and Roman Catholics and those who marry Roman Catholics are expressly excluded from the Throne. See C.C.S. Wade et al., *Constitutional Law*, 6th ed (London: Longman, 1960) at 455. Two fundamental changes have, however, been approved in English succession law: sons and daughters of every future British monarch will have equal right to the throne and the monarch can now marry a Roman Catholic. The new rules were unanimously approved by leaders of the sixteen Commonwealth countries where the Queen is head of state, at the Commonwealth Heads of Government meeting in Perth, Australia. See O. Madu, "Commonwealth Leaders Okay Changes in British Succession Laws" *The Guardian* (October 29, 2011) at 7.

in this type of state, there is no total absence of the state from religious affairs as the state offers aid and protection on the basis of equality to all religions.⁵⁶

III. WHETHER NIGERIA IS A SECULAR STATE

Having examined the concept of secularism the next question is whether Nigeria under the current 1999 Constitution is a secular state.

A. Constitutional Provisions Relating to Religion

The provisions of the 1999 Constitution relating to religion are set out below for the purpose of their community reading.

- Section 1 (1) – This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the federation.*
- Section 1 (3) – If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency be void.*
- Section 10 – The Government of the Federation or of a state shall not adopt any religion as a state religion.*
- Section 14(2) (a) – sovereignty belongs to the people of Nigeria from whom Government through this Constitution derives all its powers and authority.*
- Section 15 (2) – discrimination on the grounds of place of origin, sex, religion ... shall be prohibited.*
- Section 17 (3) – The state shall direct its policy towards ensuring that ... (b) there are adequate facilities for leisure and for social, religious and cultural life.*
- Section 23 – The National Ethics shall be discipline, integrity, dignity of labour, social justice, religious tolerance, self-reliance and patriotism.*
- Section 38 (1) – Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.*
- Section 38 (2) – No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.*
- Section 38 (3) – No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.*
- Section 42 (1) – A citizen of Nigeria or of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:*
 - a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or*
 - b) Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.*

⁵⁶ Wade et al, *Constitutional Law*, *ibid* at 114-115. For a somewhat similar categorization of states in terms of their relationship with religion, see W. C. Durham, "Nigeria's 'State Religion' Question in Comparative Perspective" in P. Ostien, et al, *Comparative Perspectives on Shari'ah in Nigeria*, *supra* note 2 at 150 -159.

Section 262 of the Constitution empowers any state that wants it to establish a Sharia Court of Appeal. However, the jurisdiction of the Sharia Court of Appeal is limited to matters touching upon Islamic personal law.⁵⁷ Section 277 makes similar provision in respect of the Federal Capital Territory. Section 237 (2) (b) requires that not less than three members of the Court of Appeal should be persons learned in Islamic personal law.⁵⁸ Oaths of office have been prescribed for certain offices before assumption of office, and on application for citizenship by registration or naturalization.⁵⁹ The 1979 Constitution contains similar provisions.⁶⁰

In the absence of express Constitutional proclamation about the secularity of Nigeria the question that arises is whether the above Constitutional provisions entrench secularism. The *Jama'atu Nasril Islam*⁶¹, which expressed the opinion that Nigeria is not a secular state advanced some reasons for their position which could be summarized as follows. There is no express Constitutional provision that Nigeria is a secular state and there are the following provisions of the Constitution which negate secularism: the provisions of the Constitution enjoining the state to promote religious affairs; the educational objectives under the Constitution implying moral education which must be based on religion; the creation by the Constitution and provision for their funding of courts which apply religious laws and laws inspired by religion; the Christianization of the polity means that the country cannot be considered a secular state unless de-Christianized. We shall now consider whether the foregoing Constitutional provisions provide for or negate the secularity of Nigeria. The next issue to consider is whether the Constitutional provision enjoining states to provide facilities for religious life negates secularism.

B. State Obligation to Provide Facilities for Religious Life

The *Jama'atu Nasril Islam*⁶² has contended that section 17 (3) (b) of the 1979 Constitution on social objectives contradicts secularism, as the section has made it clear that the government can promote religious affairs.⁶³ Contrary to this view, the Constitutional injunction that the state should provide facilities for religious life does not negate the secularity of the Nigerian state. As earlier mentioned, secularism is neither opposed nor indifferent to religion. Secularism seeks to create a conducive environment for the exercise of religious freedom. There are also spectrums of secularism. While some secular states may rigidly not intervene in religious affairs, a state is no less secular because it provides facilities for religious life without discrimination in favour or against any religion. One is in agreement with the view that Nigeria practices egalitarian and

⁵⁷ See *Alhaji Saidu Usman & Anor v Alhaji Salihu Kareem*, (1995) 2 NWLR (pt 379) 537, where the Supreme Court reiterated that the jurisdiction of a Sharia Court of Appeal under the Constitution is limited to questions of Islamic personal law.

⁵⁸ By section 240 of the 1999 Constitution, *supra* note 5, appeals lie from Sharia Court of Appeal to the Court of Appeal

⁵⁹ See sections 26(1) and 27(1) of the 1999 Constitution, *supra* note 5.

⁶⁰ These sections are in *pari materia* with sections 10, 15(2), 17(3), 37(1), (2)&(3), 39(1)(a)&(b), 242 and 262 of the Constitution of the Federal Republic of Nigeria, 1979.

⁶¹ See the "Text Of Press Conference By The *Jama'atu Nasril Islam (JNI)* On The Nigerian Constitution And The Nigerian Muslim Ummah, February 13, 1999", *The Guardian* (March, 15 1999) at 16.

⁶² *Ibid.*

⁶³ The Constitution did not, however, require the state to promote religious affairs. The Constitution merely required the state to provide facilities for, among other things, religious life.

protective secularism under which there is no official religion or church but the Nigerian state is under obligation to offer protection and encouragement to all religions on the basis of equality of all religions.

Thus the model of Nigeria's secularism differs from that of the United States of America under which the state is totally separated from religion. The rigid separation of state and religion is criticized not only by Islamic scholars but by some liberal scholars. For instance, Professor Ben Nwabueze observed as follows:

It can thus be concluded that no society in which morality and religion are absent can ever attain and maintain liberty, democracy and justice. Hence, religion needs encouragement by the state to thrive and to be effective in providing an anchor for morality and in fostering the morality-based values of liberty, democracy and justice, and in inculcating among citizens morality, spirituality and piety. A developing country should not indulge in the doctrinaire rigidity of the state completely dissociating itself from religion. Whatever discrimination against non-religionists – agnostics and such others – that may be entailed in the state giving encouragement to all religions on the basis of equality is not really an unfair one, certainly not such as to warrant the state in keeping off religion completely.⁶⁴

It must be noted that while section 10 comes within the justiciable part of the Constitution, section 17(3) comes under the Fundamental Objectives and Directive Principles of State Policy, which is not justiciable. It was held by the Court of Appeal in *Okogie v Governor of Lagos State*⁶⁵ that where there is a conflict between the provisions of the Fundamental Objectives and Directive Principles of State Policy which are not justiciable and the Fundamental Rights which are justiciable, the conflict ought and should be resolved in favour of the latter. Similar decision was reached in *Adamu v Ag. Borno*⁶⁶ by the Court of Appeal. It is, however, submitted that there is no conflict between sections 10, 38 and 42 of the Constitution on the one hand, and section 17(3) on the other hand.

Another pertinent question is whether the inclusion of the educational objective in the Constitution is contrary to secularism.

C. Secularism and the Education Objectives

It was also contended by the *Jama'atu Nasril Islam* that one of the indicators that Nigeria is not a secular state is the inclusion of the education objectives in the Constitution. In this view, "section 18 of the Constitution on educational objectives contradicts secularism as education means intellectual and moral training, and moral training of Muslims and Christians can only be carried out through their religions". It is pertinent here to set out the education objectives contained in the Constitution.

Section 18

- (1) *Government shall direct its policy towards ensuring that there are equal and adequate opportunities at all levels.*
- (2) *Government shall promote science and technology.*

⁶⁴ B.O. Nwabueze, *Constitutional Democracy in Africa*, Vol. 3 (Ibadan: Spectrum Books, 2003) at 332.

⁶⁵ (1981), 2 NCLR 337. See also *Adewale v. Jakande* (1981), NCLR 262 for a similar decision.

⁶⁶ (1996), 8 NWLR 203.

- (3) *Government shall strive to eradicate illiteracy; and to this end, Government shall as and when practicable provide*
- (a) *free, compulsory and universal primary education;*
 - (b) *free compulsory and universal primary education;*
 - (c) *free university education; and*
 - (d) *free adult literacy programme.*

It is difficult to appreciate how the education objectives contradict secularism. What secularism sets out to achieve is to liberalise education so that it will not be dependent on religion. Secularism enables public education to be based on reason and science but as a matter of choice any adherent of any religion can base his education or moral on his religion as a matter of private choice. The wording of the education objective under the Constitution is similar to the wording of the right to education under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁷ The Human Rights Committee in its General Comment No. 22⁶⁸ on the right to freedom of thought, conscience and religion⁶⁹ observed that public education that includes instructions in a particular religion or belief is inconsistent with Article 18.4 of the International Covenant on Civil and Political Rights (ICCPR) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. The Committee also observed that restriction on human rights based on morality must be based on principles not deriving exclusively from one religion. Consequently, the contention of *Jama'atu Nasril Islam* is not only contrary to the principle of secularism but also the principles of international human rights law.

D. Constitutional Provision for Sharia Court of Appeal

Perhaps the most controversial issue relating to the question of the secularity of Nigeria is the provision for Sharia Court of Appeal in the Constitution. Both the 1960 and 1963 Constitutions did not make provision for Sharia Court of Appeal, even though the court existed in the Northern region. However, subsequent Constitution making processes witnessed agitations by Muslims for Constitutional recognition of increased scope of application of the Sharia.⁷⁰ The Sharia question was obviously the most controversial issue during the conferences that preceded the making of the 1979 Constitution and subsequent Constitutions. The Constitution Drafting Committee (CDC) which drafted the 1979 Constitution recommended the provision for a Federal Sharia Court of Appeal which will exercise exclusive final appellate jurisdiction on questions of Islamic law. The recommendation ignited heated debate and vigorous opposition by Nigerian Christians while Muslims passionately supported the idea.

⁶⁷ Article 26 of the *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217A (III), UN Doc A/810 at 71. Also see Article 13 of the *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3.

⁶⁸ *General Comment No 22*, *supra* note 46.

⁶⁹ *International Covenant on Civil and Political Rights*, *supra* note 47.

⁷⁰ See M. Tabiu, "An Overview of Sharia Law and Practice in Nigeria" in J. Ibrahim, ed, *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach* (Zaria: Global Rights Partners for Justice, 2004) at 115.

It was contended that the inclusion of the Sharia Court of Appeal in the draft Constitution torpedoed the injunction that Nigeria should be a secular state.⁷¹ Looking at the matter from the prism of discrimination against adherents of other religions, Ochinokwu Somolu wondered why the Sharia Court system was specially provided for in the draft Constitution and asked whether there were prospects that those who belong to other religions will be provided with court systems which will take account of their peculiar religious beliefs.⁷² It was further argued against the establishment of the Court that it might further complicate the already complicated legal system by leading to jurisdictional conflicts. On the other hand, some schools of thought justify the proposal for inclusion of Sharia Court of Appeal in the Constitution on various grounds. A renowned jurist, Abiola Ojo, observed that about half the population of Nigeria is subject to Islamic personal law. Consequently, the establishment of the Court as the final authority on Sharia law will encourage a coherent and consistent development of that body of laws.⁷³ On the proposal for the establishment of Customary Court of Appeal he maintained that the unending diversity of customary laws – as opposed to the single, unified and coherent body of Sharia law – would make the proposal unrealistic.

From another perspective, the provision for Sharia Court of Appeal by the Constitution was as a result of the fact that the Islamic system has supplanted the local customs entirely in many parts of Northern Nigeria, and occupies the same position in relation to those areas as does customary law to most of the communities in Southern Nigeria and parts of Northern Nigeria (especially the Middle Belt Area). In the circumstance, the provision for Sharia Courts in the Constitution is intended to fulfill for Muslims the role of customary courts to non-Moslems.⁷⁴

Taking a middle course on the matter, Professor D.I.O. Ewelukwa suggested that the High Court should absorb the proposed Sharia Court of Appeal. To him, within each state the High Court should have judges with diversified areas of specialization so that where necessary, it will be able to have divisions competent to hear and determine issues based on special areas of law, such as the Moslem personal law, revenue law, customary law, commercial law, admiralty law etc. In other words the Sharia Court of Appeal should be absorbed in the new High Court as a division of it. The type and number of judges appointed to the high court of a state should depend upon the nature and volume of cases to be handled by the court. To him, the merits of this arrangement are the simplified nature of the judicial structure the Constitution sought to establish and the absence of possibility of jurisdictional disputes. Further, it will emphasize the unity of our legal system and discourage any attempt to see any branch of our law as part of one or other of two separate legal systems. He maintained that the recommendation of the CDC gave the impression that Nigeria has two separate legal systems each of which strives to maintain its identity. Yet, the Muslim personal law is only an aspect of our national legal system.

⁷¹ See E. Nta, "Let's View the Critical Aspects" in Ofonagoro, *The Great Debate*, *supra* note 45 at 367. He regards the provision for Sharia Court of Appeal as a most retrogressive and highly indefensible step.

⁷² See O.E.E. Somolu, "Religions and Law" in Ofonagoro, *ibid* at 372.

⁷³ Similarly, the Chairman of the Constitution Drafting Committee, Chief Rotimi Williams defended the provisions for a Sharia Court of Appeal on the ground that "Islamic law has coherence and is enforceable over a large area" *Daily Times* (April 26, 1977), cited in Ofonagoro, *The Great Debate*, *ibid* at 367.

⁷⁴ A.E.W. Park, *The Sources of Nigerian Law* (Lagos: African Universities Press, 1968) at 65-6.

At the constituent assembly constituted to consider the draft Constitution, the issue of Federal Sharia Court of Appeal resulted in a stalemate, with Muslim members for it and Christian members against it. The compromise was the provision for a Sharia Court of Appeal for a state that wants it. Explaining the background to the inclusion of the Sharia Court of Appeal in the Constitution, Professor Ben Nwabueze said:

... a Sharia Court of Appeal in the Constitution, which was a half-way compromise contraption adopted by the Constituent Assembly in 1978 to placate the Moslem members who had walked out en masse from its meetings to press home their demand for a full Constitutional recognition of the Sharia in its civil as well as criminal aspects. The compromise, of which I was one of the principal architects, bestowed Constitutional recognition on Sharia, counter-balanced by a like recognition of customary law, but only to the extent of establishing for "any state that requires it," a Sharia Court of Appeal or (as the case may be) a Customary Court of Appeal.⁷⁵

The jurisdiction of the Sharia Court of Appeal was however limited to questions of Islamic personal law.⁷⁶

In any case, many Nigerian Muslims are not content with the limitation on the jurisdiction of the Sharia Court of Appeal to questions of Islamic personal law. They use every opportunity to seek the expansion of the jurisdiction of the Sharia Court of Appeal to all questions of Islamic law. In pursuit of this objective, the Babangida regime on 25th November, 1986 promulgated *Decree No. 26*, which amended the 1979 Constitution by deleting the word 'personal' wherever it appeared after the word 'Islamic' in the Constitution in relation to the jurisdiction of the Sharia Court of Appeal. The affected sections were sections 217, 223(1), 226(a), 241(3), and 242.⁷⁷ The intention was to remove the Constitutional restriction of the jurisdiction of the Sharia Court of Appeal to matters savouring of Islamic personal law.

However, the amendment did not go far enough to achieve the desired objective as some other relevant provisions of the Constitution were, perhaps inadvertently, left unamended. Consequently, in the case of *Maida v Modu*⁷⁸ it was held by the Court of Appeal that the deletion of the word 'personal' from the provisions conferring jurisdiction on Sharia Court of Appeal does not enhance the court's restricted jurisdiction. It is also implied in the Supreme Court decision in *Usman v Kareem*⁷⁹ that though the word 'personal' was omitted from the section of the 1979 Constitution conferring jurisdiction on the Sharia Court of Appeal, the jurisdiction of the court was still restricted to matters

⁷⁵ See B.O. Nwabueze, "Freedom of Religion, The Religious Neutrality of the State Under the Constitution and the Sharia Controversy" (paper delivered at a Symposium organized by the Spiritan International School of Theology, Enugu, March, 23 2001) at 15.

⁷⁶ The concept of "personal law" finds its practical justification in the view that it would be complicating and confusing both for the individual concerned and for the people dealing with him if the legal aspect of his family life – question relating to his legitimacy, adoption, marital status and succession to his intestate estate after his death – were to be governed by the divergent laws of those states in which he may happen to be physically present, to act or to be engaged in legal transactions: I.O. Agbede, *Legal Pluralism* (Ibadan: Shaneson CI, 1991) at 254-5.

⁷⁷ The affected sections were sections 217, 223(1), 226(a), 241(3), and 242. See Federal Republic of Nigeria Official Gazette (Lagos, November 25, 1986), Vol 73, No 59 at 311.

⁷⁸ [2000] 4 NWLR (pt 651) 99. See also *Gambo v Tukuji* [1997] 10 NWLR (pt. 526) 591; *Muninga v Muninga* (1997) 11 NWLR [pt 527] 1.

⁷⁹ [1995] 2 NWLR (pt. 379) at 537.

in respect of which the court was competent to decide under subsection (2) of section 242 of the 1979 Constitution (as amended). Ogwuegbu, J.S.C., speaking for the Supreme Court, said:

The cause of action in this appeal involves a gift and the donors are Moslems. Section 242(2)(c) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 26 of 1986 vests the Sharia Court of Appeal with jurisdiction to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Law which the Court is competent to decide in accordance with the provisions of subsection (2) of that section.⁸⁰

The draft 1989 Constitution midwived under the regime of General Babangida perfected the enhancement of the jurisdiction of the Sharia Court of Appeal by extending the jurisdiction of the Court to questions of Islamic law.⁸¹ However, that draft Constitution never came into force.⁸² Decree 107 of 1993⁸³ followed the same trend as Decree 26 of 1986 in removing the word ‘personal’ which qualified the word ‘law’ from the sections of the 1979 Constitution (which conferred jurisdiction on Sharia Court of Appeal), but like Decree No. 26 of 1986, the amendment did not go far enough to achieve the desired objective. Consequently, the courts still held that the amendment had not thereby expanded the jurisdiction of the Sharia Court of Appeal. In *Gana v Alhajiram*⁸⁴ Muktar, J.C.A. (as she then was) said:

There is what I used to think is merely an academic argument to the effect that in Decree No. 107 of 1993, the word ‘personal’ has been deleted, leaving the phrase Islamic law. Whether it enlarges the jurisdiction of the Sharia Court of Appeal in the country, because Islamic law definitely is over and above Islamic personal law (sic). The former includes all aspects of Islamic civil matters plus criminal law; while the latter is restricted to Islamic personal law as provided by section 242(2) (a-b) of the 1979 Constitution of the Federal Republic of Nigeria as amended. I think such argument is uncalled for. The deletion of the word personal does not, in my view, confer additional jurisdiction on the Sharia Court of Appeal.

Accordingly, Her Lordship held that the intendment of the legislature was to confine the powers and jurisdiction of the Sharia Court of Appeal to matters of Islamic personal law.

The draft 1995 Constitution⁸⁵ enlarged the appellate jurisdiction of the Sharia Court of Appeal by providing that the Court shall have competence to decide questions of “Islamic law” instead of questions of “Islamic personal law”.⁸⁶ It was, however, not

⁸⁰ *Usman v Kareem*, *supra* note 79 at 551-552.

⁸¹ See sections 242 and 261 of the *Constitution of the Federal Republic of Nigeria* (Promulgation), Decree 1989.

⁸² Following the annulment of the presidential election of June 12, 1993, the crisis of June 23, 1993 led to the relinquishment of power or “stepping aside” by General Babangida. The Interim Government headed by Ernest Shonekan lasted only until November 17, 1993, when General Sanni Abacha was announced as the new Head of State.

⁸³ Nigerian Constitutional Decree No 107 of 1993.

⁸⁴ [1997] 10 NWLR (pt 525) 424 at 433-34.

⁸⁵ The draft 1999 *Constitution* was the product of the 1994 Constitution Conference that had delegates from various spheres. See A. Augie, *Rethinking the Nigerian Constitution* (Lagos: Nigerian Institute of Advanced Legal Studies, 2008) at 24.

⁸⁶ The *Draft Constitution of the Federal Republic of Nigeria 1995* (with Amendments), ss, 266 and 281.

promulgated until the death of General Abacha in June 1998 which ushered in a new military regime.

The Sharia question also confronted the Constitution Debate Coordinating Committee [CDCC], set up by the General Abdulsalami Abubakar regime to co-ordinate views on the then proposed 1995 Constitution.⁸⁷ According to the CDCC, it received written memoranda and oral presentations recommending that Sharia, as a source of Nigerian law, be accorded equal status with Common law within the framework of the Constitution. It was further proposed that Sharia be made available to those who desire its application. In addition, there were requests for the establishment of separate appellate Sharia Courts within the judiciary. The CDCC recommended that the relevant provisions of Chapter VII of the draft 1995 Constitution on Sharia should replace the provisions of Chapter VII of the 1979 Constitution. However, that aspect of the recommendations of the CDCC was not implemented. The provisions of the 1999 Constitution relating to the jurisdiction of the Sharia Court of Appeal were substantially the same as the provisions of the 1979 Constitution.

The Presidential Committee on the Review of the 1999 Constitution inaugurated under the present civil dispensation was not left out in the Sharia debate. It proposed amendments to sections of the Constitution concerning the jurisdiction of the Sharia Court of Appeal. The Committee recommended the expansion of the jurisdiction of the Sharia Court of Appeal through the substitution of "Islamic law" for "Islamic personal law" in the sections of the Constitution providing for the jurisdiction of the Sharia Court of Appeal.⁸⁸

The Sharia controversy has reared its head again in the on-going programme of reform of the 1999 Constitution. In the recommendations of the immediate past Chief Justice of Nigeria, Justice Mudspher Dahiru, for the amendment of certain sections of the 1999 Constitution, His Lordship sought the alteration of section 244 of the Constitution in relation to the jurisdiction of the Court of Appeal to entertain appeals from Sharia Court of Appeal by substituting for the words "Islamic personal law", the words "Islamic law".⁸⁹ He also sought the amendment of section 262(a) by substituting the words "Islamic law" for the words "Islamic personal law"; and (b) deleting subsection (2) of the Constitution.

A pertinent question is whether there is a contradiction by the Constitution in prohibiting the adoption of a state religion and in at the same time providing for the establishment of Sharia Court of Appeal for a state that wants it. Professor Ben Nwabueze thinks that there is no contradiction. To him, state provision for a religion based court to enforce the civil aspect of Sharia is not inconsistent with section 10 of the 1999 Constitution. He made a distinction between civil and criminal law as it relates to the

⁸⁷ The CDCC was charged with the responsibility of piloting the debate on the *1999 Constitution*. The Committee was inaugurated on November 11, 1998.

⁸⁸ See the report of the Presidential Committee on the Review of the 1999 Constitution (incorporating the draft of the proposed amended Constitution) Vol II, February 2011. See in particular the proposed section 283 dealing with the jurisdiction of State Sharia Court of Appeal. However, the proposed section 368 dealing with the jurisdiction of the Sharia Court of Appeal of the Federal Capital Territory still restricted the jurisdiction of the court to questions of Islamic personal law.

⁸⁹ See "Amendments Judiciary Needs by Justice Dahiru Musdapher" (Bill submitted by the immediate past Chief Justice of Nigeria, Justice Dahiru Musdapher to the Senate President for amendment of certain sections of the Constitution) *Thisday* (June 24, 2012) 98.

secularity question and the Constitutional provisions relating thereto. According to the erudite Professor,

In civil law, the state, through its judicial arm, the courts, merely interposes its machinery as an impartial, disinterested arbiter between parties in a dispute; it lacks the power to initiate the process of adjudication, and must wait until it is moved by one of the disputants. So the enforcement, through the courts, of the civil aspects of Sharia does not involve the support, promotion or sponsorship by the state of the Moslem religion in preference to other religions. The controversy does not therefore concern the application of Sharia civil law.⁹⁰

It is obvious, however, that the provision for Sharia Court of Appeal in the Constitution even with its limited jurisdiction, has, to say the least, raised doubts about the secularity of Nigeria. Contrary to the position of Professor Nwabueze, the enforcement of the civil aspect of the Sharia by courts funded from the revenue belonging to Muslims and non-Muslims will raise the issue of discrimination on the ground of religion. It will also raise serious question about the religious neutrality of the Nigerian state as it may amount to promotion of Islamic religion. One finds considerable merit in the proposal of Prof. Ewelukwa that such courts should be abolished and matters within their jurisdiction transferred to a special division of the high court.

E. ALLEGED CHRISTIANIZATION OF THE COUNTRY

The *Jama'atu Nasril Islam* further contended that Nigeria can never be genuinely secular unless the country which is already heavily "Christianized" is first "de-Christianized". They alluded to the political system of Nigeria as being based on western civilization which is Christian. In addition, the Nigeria legal system which has the English Common law as its cornerstone is Christian-inspired and laden with Christian ideals and doctrines. They queried whether a country where Sunday, a Christian day of rest and worship is work-free but in which Friday, the Muslim day of special congregational prayer, is not accorded a similar treatment can be truly said to be secular. They gave many other examples of what they termed Christian manifestations in the nation's public life and institutions which include the use of the Christian cross as a symbol of Medical and Health Services in Government owned establishments to the exclusion of Islamic crescent which is a symbol of Medical and Health services to the Muslims; the adoption of the Gregorian (Christian) calendar for official use to the exclusion of the Islamic calendar; making 1st January of each year a work free day without making 1st Mubarram a work-free day, fixing long holidays to coincide with Christmas and Easter festivals without corresponding arrangements for the Muslim festivals. They concluded by saying that in spite of all these Christian manifestations in the nation's public life and institutions, some Christian leaders are calling for secularism for Nigeria not of course realizing that if secularism were to be applied all these Christian manifestations entrenched in the nation's public life must be done away with.

S.H.A. Maliki, in similar vein, alluded to the Christian origin of the common law which is one of the sources of Nigerian law. He said that the common law of England is

⁹⁰ Nwabueze, "Freedom of Religion, The Religious Neutrality of the State under the Constitution and the Sharia Controversy", *supra* note 75 at 9.

animated by Christian principles and ideas.⁹¹ On this view, Nigeria's application of the common law is evidence that Nigeria is not a secular state.

Starting with the issue of Christian origin of the common law, which is one of the sources of Nigerian law, it ought to be noted that principles of the Christian religion is a historical and not a formal source of the common law. Religion can be a historical source of law in a secular state without impacting on the secularity of the state.⁹² It is only when religion is promoted to a formal or legal source of law⁹³ that consistency with the secularity of state will be in issue.

On the issue of Sunday as a public holiday or the fixing of dates of national events, it will be practically difficult to treat all religions equally on the matter. Fixing of date of national events may coincide or collide with the date of worship of some religious groups in a multi-religious society. Such a situation arose in the case of *Dickson Ojiegbe & Anor v Marcus W. Ubani & Anor*.⁹⁴ The issue in that case was whether the conduct of an election on a day not favourable to a religious group amounts to a denial of the right to freedom of religion and conscience of the group concerned. The matter was, however, an election petition. It was held that the failure of the group to participate in the election did not affect the outcome of the election in view of the number of the members of the group and the margin with which the election was won. Assuming the case was not decided on that ground, it might be difficult to choose a date that will be suitable to all the religious groups.

On the issue of observing Sundays as a public holiday, the date is not nationally recognized as a day of worship even if it has a historical religious significance. That date is now more of a uniform day of rest even though it coincides with the day of worship of most Christian denominations. In the U.S.A. case of *McGowan v Maryland*⁹⁵ dealing with the *Sunday Closing Laws* the U.S. Supreme Court rejected claims that Sunday Closing Laws violated the religion clauses. Chief Justice Warren, in his majority opinion, noted that in *McGowan* there is "no dispute that the original laws which dealt with Sunday labour were motivated by religious forces". However, he came to the conclusion that in the light of the evolution of the said laws for centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. According to His

⁹¹ S.H.A. Malik, "The Application of Shari'a as a Legal System in Nigeria" in A.M. Yakubu et al, eds, *Understanding Shari'a in Nigeria* (Ibadan: Spectrum Books Limited, 2001) at 135. Professor Y.A. Quadri also expressed a similar view in a paper entitled "Shari'ah: The Islamic Way of Life", which he presented at the 7th Ramadan Lecture organized by the University of Ibadan Muslim Community on January 2, 2000 at 27. For yet another similar opinion see A. Uchegbu, *The Jurisprudence of the Nigerian Legal Order* (Lagos: Ecowatch Publications (Nigeria), 2004) at 174.

⁹² On the influence of religion on law see T.A.O. Tugbiyele, *The Influence of Religion on Law* (Lagos: Tughiyele & Co, 2010). See also C.C. Wigwe, *Jurisprudence and Legal Theory* (Osun-Accra: Readwide Publishers, 2011) at 110.

⁹³ For the connotations of the expression "source of law" see C.K. Allen, *Law in the Making*, 7th ed (Oxford: Clarendon Press, 1964) at 1; P.J. Fitzgerald, *Salmond on Jurisprudence* (Bombay: NM Tripathi Private Limited, 1966) at 109; H.L.A. Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1961) at 246; A.O. Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1981) at 55; R.W.M. Dias, *Jurisprudence* (London: Butterworths, 1985) at 13.

⁹⁴ (1963) All NLR 400.

⁹⁵ 366 US 420 (1961).

Lordship, the present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.

It is also pertinent to note that the issues relating *inter alia* to the Christianization of the calendar, the application of Christian public holidays, and the observance of dates significant to Christians as public holidays do not go to the question whether the Constitution has provided for the secularity of Nigeria as they were not imposed by the Constitution. These issues may rather raise the question of practical compliance with the secularity of the country as provided for in the Constitution.

F. WHETHER THE CONSTITUTION ESTABLISHES THE SECULARITY OF NIGERIA

Section 10 of the Constitution which prohibits the federal and state governments from adopting any religion as state religion has been a subject of tendentious interpretations. It has been opined that the formulation of the section as a compromise provision was deliberately made ambiguous.⁹⁶ According to the press statement signed by Justice Bashir Sambo, Secretary-General of the *Jama'atu Nasril Islam*, if we examine all the Nigerian Constitutions of the past and present, we cannot find any provision which says that Nigeria is a secular state. The Constitution did not state that Nigeria is a secular state and therefore it is not right to impute to the Constitution what it did not say, he concluded.⁹⁷

It goes without saying that the Constitution did not expressly state that Nigeria is a secular state. However, notwithstanding the Constitutional silence on the matter, the intention of the drafters of the Constitution can be gathered from a community reading of the relevant provisions of the Constitution. There are postulates behind the words of the Constitution which could be gleaned from the Constitutional provisions even when the express words are not used. For instance, there is no express mention of separation of powers in the Constitution but the Constitution has been interpreted as importing the doctrine of separation of powers. In *Ag. Bendel v Ag. Federation & 22 others*⁹⁸, Attanda Fatai Williams, Chief Justice of Nigeria (as he then was), observed that the doctrine of separation of powers which is fundamental to the Constitutional system of the Federal Republic of Nigeria arises not from any provision of the Constitution but because behind the words of the Constitutional provisions are postulates which limit and control the three departments of government. The absence of express Constitutional provision on secularity of the Nigerian state is therefore not a matter of great moment in considering whether Nigeria is a secular state.

Again, it is argued that, having regard to the totality of the Constitutional provisions relating to religion, Nigeria is not a secular state.⁹⁹ In this view, section 10 of the 1979 Constitution is wrongly interpreted to mean secularism in the light of the other

⁹⁶ See I. Jibrin, "Preface" in E.E.O. Alemika & F. Okoyeeds, *Ethno-Religious Conflicts and Democracy in Nigeria: Challenges* (Kaduna: Human Rights Monitor, 2002). Jibrin maintained that the attempt to clarify Nigeria's policy on religion during the 1989 Constituent Assembly through the following formulation: "No Government shall overtly or covertly give preferential treatment to any particular religion" was rejected on the ground that Nigerians are very religious people, and therefore, the state cannot hands off religion.

⁹⁷ See Jama'atu Nasril Islam (JNI), "Text of a Press Conference On The Nigerian Constitution And The Nigerian Muslim Ummah, February 13, 1999" *The Guardian* (March 15, 1999) at 16.

⁹⁸ (1982) 3 SNCLR 1.

⁹⁹ *Ibid.*

sections of the Constitution which contradict secularism. Bilkisu Yusuf (strangely) contended that section 10 of the 1979 Constitution is explicit that Nigeria is not a secular state. According to her, the section made no mention of secularism; rather, what obtains under this Constitutional provision is a system whereby the state serves as an umbrella to safeguard the right of all to worship without hindrance.¹⁰⁰ One cannot appreciate how section 10 is explicit that Nigeria is not a secular state. Can the Constitutional silence on the matter be equated with Constitutional explicitness on the issue?

A retired Justice of the Supreme Court Justice Niki Tobi similarly expressed the view that Nigeria is not a secular state. He said:

There is the general notion that section 11 (of the 1989 Constitution, similar to section 10 of the 1999 Constitution) makes Nigeria a secular nation. That is not correct. The word secular etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular, means the belief that state, morals, education etc should be independent of religion. What section 11 is out to achieve is that Nigeria cannot, for example, adopt either Christianity or Islam as a state religion. But that is quite different from secularism.¹⁰¹

With due respect, one cannot appreciate the logic and conclusion of His Lordship that section 11 of the 1989 Constitution did not entrench secularism. His opinion borders on misconception of federalism.

The *Jama'atu Nasril Islam* interpreted the Constitutional provision on religion to mean that everybody is at liberty to practice a religion of his or her own choice with government assistance where necessary without showing a favour to any particular religion.¹⁰² To them, the Constitutional provisions also mean that Nigeria should be a multi-religious state in which a single religion is prohibited from being imposed on the citizens of the country.¹⁰³ This interpretation is plausible, but contrary to the position of the group, the interpretation is consistent with secularism. It is based on their misconception of secularism that they further stated that "it does not make sense and it (*sic*) unthinkable to imagine that a country like Nigeria which is highly religious country of mainly Muslims and Christians can be a secular state". R.P. Dhokalia suggests, rightly in my view, that Nigeria adopted the egalitarian and protective secularism under the 1979 Constitution.¹⁰⁴ Explaining the purport of section 10 of the 1999 Constitution of Nigeria, Rudd Peters noted that "this is generally understood to mean that neither the legislative power nor the executive power may in any way be used to aid, advance, foster, promote or sponsor a religion"; an opinion consistent with secularism.¹⁰⁵

¹⁰⁰ Yusuf, "Da'wa and Contemporary Challenges Facing Muslim Women in Secular States", *supra* note 40 at 279.

¹⁰¹ N. Tobi, "Law, Religion and Justice" in W. Owaboye, ed, *Fundamental Legal Issues in Nigeria: Essays in Honour of Andrew Obaseki* (Lagos: Patlink Publishers, 1999) at 97.

¹⁰² See *Ag. Bendel v Ag. Federation & 22 others*, *supra* note 98.

¹⁰³ *Ibid.*

¹⁰⁴ "The Human Right to Religious Freedom: Problems of Definition and Effective Enjoyment", *supra* note 54, at 114-115. Professor Amechi Uchegbu is one of those who believes that Nigeria is a secular state. See Uchegbu, *The Jurisprudence of the Nigerian Legal Order*, *supra* note 91 at 174.

¹⁰⁵ R. Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum Books Limited, 2003) at 33. However, he ought to have added that the executive or legislative powers should also not be used to hinder any religion.

On the question whether the Constitution has provided for the secularity of the Nigerian state, Professor Nwabueze prefers to say that by prohibiting the adoption of any religion as a state religion by a state or the Federal Government, the Constitution entrenches the religious neutrality of the state. He considers it irrelevant whether this neutrality is termed secular or is called by some other names.¹⁰⁶

To answer the question whether Nigeria is a secular state under the 1999 Constitution, one has to juxtapose our definition of federalism with the following facts. The Constitution is supreme, and sovereignty belongs to the nation and the people of Nigeria and not to a religious order. Both the federal and state governments are prohibited from adopting any religion as state religion. The Constitution guarantees freedom of thought, conscience and religion and prohibits discrimination on ground of religion. Given these provisions, the conclusion that Nigeria is a secular state is compelling. This is notwithstanding the Constitutional provision for a Sharia Court of Appeal which could be considered an exception specially provided for by the Constitution.

IV. CONCLUSION

Secularism implies that religion is not the foundation of the state. Secularism is aimed at the protection of freedom of religion. There are spectrums of secularism

The 1999 Constitution of Nigeria did not use the expression “secular” to qualify the Nigerian state. The word cannot also be found in any section of the Constitution. Section 10 of the Constitution which prohibits both the Federal and State Government from adopting any religion as state religion is somewhat ambivalent. This ambivalence is accentuated by the Constitutional provision for a Sharia Court of Appeal and the Constitutional obligation on states to provide facilities for religious life. However, when section 10 of the Constitution is read together with other sections of the Constitution relating to religion, especially the provisions for the supremacy of the Constitution; sovereignty of the people and the nation, freedom of thought, conscience and religion, and prohibition of discrimination on the ground of religion, as well as the provision on the supremacy of the Constitution and the sovereignty of the people, the plausible conclusion is that Nigeria is a secular state.

It is, however, recommended that future Constitution makers in Nigeria should make an express statement on the secularity of Nigeria to put the matter beyond doubt. As a result of the divergent perspectives on the concept of secularism, it is also imperative that a detailed definition of secularism within the context of the Constitution should be given. It is also recommended that the provision for Sharia Court of Appeal should be expunged from the Constitution. Matters of Islamic personal law within the jurisdiction of the court could be transferred to a special division of the High Court. This will remove every doubt about the secularity of the country.

¹⁰⁶ B.O. Nwabueze, “Freedom of Religion, The Religious Neutrality of the State under the Constitution and the Sharia Controversy”, *supra* note 75 at 13.